Supreme Court, U. S.
FILED
NOV 14 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-361

ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, ET AL.,

Appellants,

vs.

F. DAVID MATHEWS, Secretary of Health, Education and Welfare,

Appellee.

On Appeal from the United States District Court for the Northern District of Illinois

RESPONSE TO MOTION TO AFFIRM

R. R. McMAHAN
135 S. LaSalle Street
Chicago, Illinois 60603
Attorney for Appellants

LORD, BISSELL & BROOK
135 S. LaSalle Street
Chicago, Illinois 60603
Of Counsel

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-361

ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, ET AL.,

Appellants,

VS.

F. DAVID MATHEWS, Secretary of Health, Education and Welfare,

Appellee.

On Appeal from the United States District Court for the Northern District of Illinois

RESPONSE TO MOTION TO AFFIRM

1. There is no merit to the Secretary's contention that the "facial" constitutionality of the PSRO legislation has not been drawn into question by the allegations of the plaintiffs' complaint in this case. In his Motion to Affirm, the Secretary admits that the scheme of prior and concurrent review created by the PSRO law will interfere with a physician's judgments concerning the diagnosis, treatment and

care of his patients and the physician-patient relationship, itself. That interference, the Secretary maintains in his motion, is ". . . a necessary concomitant of the attainment of Congress' objectives; indeed the major objectives cannot be achieved unless physicians' decisions are affected." (Motion pp. 8-9). This is the very aspect of the PSRO legislation plaintiff physicians allege to be violative of their rights, and the rights of their patients, under the federal Constitution. Accordingly, the Secretary should not be heard to argue that the impact of this legislation in the respects alleged by plaintiffs to be injurious is speculative or conjectural because the legislation has not been implemented.

2. The critical issue raised by this appeal is embodied in the Secretary's contention (Motion p. 5) that persons entitled to Medicare-Medicaid benefits do not have a right to be treated by a qualified physician of their choice, and in the manner that their physician, exercising his best professional judgment, deems to be medically necessary. Consequently, the Secretary concludes, plaintiffs here are not entitled to a hearing on their charge that the restraints which Congress has superimposed upon their treatment of patients eligible for such benefits seriously threatens their ability to provide, and their patients' ability to receive, medical care of the highest professional quality. The Secretary does not offer this Court any authority in support of that bald assertion. There is ample authority to the contrary, as plaintiffs have demonstrated in their Jurisdictional Statement.

The Secretary ignores the decisions of this and other courts which have recognized that a physician's right to practice his profession and the physician-patient relation-

ship itself involve constitutionally protected interests of both patients and physicians. (J.S. pp. 10, 16-18). The Secretary ignores the well-settled proposition that congressional enactments regulating public benefits are not immune to scrutiny for arbitrariness, irrationality or overbreadth (J.S. p. 15) as plaintiffs have alleged to be the case here. The Secretary ignores the decisions of this Court holding that participation in, or access to, so-called public privileges or benefits may not be conditioned upon surrender of one's constitutional rights (J.S. pp. 14-15) as plaintiffs have alleged to be the case here. The Secretary ignores the decisions of this Court holding that legislation impinging upon rights considered fundamental under the Constitution must be defended by the government as being justified by a compelling state interest (J.S. pp. 15-16) —a burden the district court erroneously failed to require the Secretary to discharge in this case.

Most significantly, the Secretary has ignored the clear and inescapable conflict between the decision reached in *American Medical Ass'n., et al.* v. *Weinberger,* ..... F.2d ....., C.A. 7, No. 75-1547, decided July 22, 1975, and the result urged by the Secretary and accepted by the court in the instant case. If it were true, as the Secretary would have this Court believe, that regulatory interference with the medical treatment of Medicare-Medicaid beneficiaries is immune to judicial scrutiny because the physician-patient relationship involves no rights of constitutional magnitude, then the complaint in the *AMA* case should have been dismissed for failure to state a claim, just as was done in the instant case. The *AMA* complaint was not dismissed; the district court and the court of appeals recognized that the allegations of harmful and unnecessary interference with

the physician-patient relationship were *sufficient to raise an issue* of violation of *constitutionally protected* interests which should be resolved at trial. (See J.S. pp. 10-12). The Secretary has not appealed that decision.

Characterizing the PSRO law as merely a regulation of the dispensation of federal funds (see Motion pp. 11-12) is no more an answer to the charges made in this case than it was in the *AMA* suit. This Court should not allow itself to be misled, as the district court was, by the fiction that the PSRO law is not coercive in its effect because it ". . . does not require a physician to prescribe or refrain from prescribing any form of treatment" (Motion pp. 11-12), or because "a physician remains at liberty to decline to participate in the Medicare or Medicaid programs or to forego reimbursement in a particular instance." (Motion p. 12). As plaintiffs have noted at the outset of this Response, the Secretary admits that the PSRO legislation was designed and intended to modify physician conduct in the treatment of federal health care beneficiaries by dictating how, when, where and to what extent, if at all, such patients are to be treated and by whom they are to be treated. The obligation to conform to bureaucratically devised standards and procedures will reach virtually every facet of a physician's practice, whether or not he chooses to accept federal reimbursement for patient care. To practice his profession effectively, a physician must have access to hospitals and other health care facilities, and he must deal with other physicians and health care professionals.

The legislation in question imposes the same duties of compliance upon these institutions and professionals. They in turn are compelled to assure the compliance of the physicians with which they deal. Thus, if one of the plaintiff physicians chose to treat all of his elderly and indigent patients completely free of charge, he would not be permitted to treat them in hospitals whose costs of services would be federally reimbursed in whole or in part, nor treat them in collaboration with other professionals whose fees would be in some part federally reimbursed, unless he also conformed his treatment to the federal requirements. (See 42 USC 1320c-9).

As plaintiffs have noted in their Jurisdictional Statement, it is the intention of the government that the controls over medical diagnosis, treatment and care set out in the PSRO law ultimately be applied directly to all patients being treated in hospitals and other such facilities, whether or not they are federal beneficiaries. (See J.S. pp. 13-14).

The impact of the PSRO law will be particularly harsh in those professionally less desirable rural areas of the country where great numbers of people are served by relatively few physicians. These physicians do not have the choice of sending their patients to other physicians if they do not wish to submit their professional judgments to governmental direction and control; neither can they escape this dilemma by rendering free services. Their choice is to refuse Medicare-Medicaid beneficiaries the only medical treatment available to them in the area, or submit to the requirements of the law in order that their patients might have access to reimbursable hospital care.

3. The Professional Standards Review Organizations mandated by this legislation are not in any way analogous to traditional private peer review or utilization review committees. The PSRO's are a device for the implementation on a massive scale of a plan for federal administrative di-

rection and control of the substantive aspects of medical practice through an elaborate system of prior and concurrent restraints on the conduct of physicians and health care providers. Plaintiffs have alleged that this statutory scheme will seriously impair their ability to render, and their patients' ability to receive health care in accordance with the highest standards of medical practice, because proper medical practice demands that in diagnosing and treating a patient, a physician must take into consideration a host of often-changing factors that are unique to each patient and *inherently incapable of reduction to "norms"*. (J.S. p. 8; Complaint Part I ¶2, Part III ¶9). It is important to remember that plaintiffs have not been given an opportunity for a hearing on these allegations, because the district court dismissed their complaint in the erroneous belief that the harm alleged was not legally redressable. The Secretary's assertion (Motion p. 8) that there is no constitutional difference between the prior and concurrent review of services by a PSRO and subsequent review pursuant to traditional procedures is nothing but that —a bare and unsupported assertion. It is no substitute for a hearing at which these issues could be ". . . . adjudicated in an orderly, principled and judicious manner." *American Medical Ass'n., et al.* v. *Weinberger*, C.A. 7, No. 75-1547, Slip. Op. p. 5 fn 7.

CONCLUSION

For the reasons stated herein the Secretary's Motion to Affirm the decision of the District Court should be denied.

Respectfully submitted,

R. R. McMAHAN
135 S. LaSalle Street
Chicago, Illinois 60603
Attorney for Appellants

LORD, BISSELL & BROOK
135 S. LaSalle Street
Chicago, Illinois 60603
Of Counsel